



DATE: July 9, 1998  
CASE NO.: 96-INA-118

*In the Matter of:*

**CASTEC, INC.,**  
Employer,

*on behalf of*

**LOURDES Y. ENRIQUEZ,**  
Alien.

Appearance: Wade J. Chernick, Esq.

Before: Guill, Wood and Vittone  
Administrative Law Judges

JOHN M. VITTON  
Chief Administrative Law Judge

### **DECISION AND ORDER**

***Per Curiam:*** This case arises from an denial of an application for labor certification<sup>1</sup> by a window shade manufacturer for the position of Accountant.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 C. F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

An application for labor certification for the position of Accountant was filed by Employer, Castec, Inc., on behalf of the alien, Lourdes Y. Enriquez, on February 24, 1994 (AF 79). Minimum requirements for the job were a B.S. degree in Business Administration and one year of experience in the job offered (AF 79). In addition, the Employer required that the applicant have prior experience in cash flow and budgetary projections, inventory control

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<sup>1</sup> Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. Unless otherwise indicated, all regulations cited to herein may be found at Title 20 of the Code of Federal Regulations.

experience, auditing background, experience with DAC-EASY Accounting systems and experience in financial statement analysis. The recruitment process produced ten U.S. applicants, all of whom were rejected for the position (AF 79-182).

The CO filed his Notice of Findings on December 14, 1994, questioning the rejection of one U.S. applicant, Walter Speekman (AF 73-77). Employer's rebuttal, filed February 17, 1995, contends that applicant Speekman is not qualified for the position and that the requirements he lacks are essential to performance of the accountant position (AF 52-70). The Employer submitted letters from two accountants to support its contentions.

In the CO's Final Determination, dated January 31, 1995, it was found that the Employer had not adequately demonstrated that the rejection of applicant Speekman was lawful and job-related (AF 45-51). Therefore, labor certification was denied. The Employer filed a request for review on April 6, 1995 (AF 1-44).

## **DISCUSSION**

The determinative issue before the Board is whether Employer unlawfully rejected U.S. applicant Walter Speekman for failure to meet the qualifications for the position of accountant. Employer rejected applicant Speekman based on his lack of experience and familiarity with DAC-EASY accounting software, and insufficient auditing experience including no experience in instituting internal control procedures (AF 94-95).

In the NOF, the CO noted that review of the applicant's resume indicates that he had experience with "Mainframe, Mini & Micro computer experience and Lotus 1-2-3 proficiency," stating that this experience and familiarity provided the applicant with the ability to learn DAC-EASY with a reasonable period of on-the-job training. In relation to this requirement, the CO stated that the requirement of knowledge in DAC-EASY seemed tailored to the alien's background citing § 656.21(b)(2) and demonstrated that the job offer was not clearly open to otherwise qualified U.S. workers who possessed the qualifications normally required for the occupation under § 656.20(c)(8). Finally, the CO concludes that to reject an experienced professional, such as Applicant Speekman, because he lacks experience with employer's computer system indicates the employer has not engaged in good faith recruitment under § 656.21(b)(6).

Employer replied in its rebuttal to the NOF that

I believe, then that the failure of the U.S. [worker] to meet our requirements constitutes a lawful job-related reason for not hiring the person. Furthermore, you have also asked this company to explain how the job opportunity was clearly open to the U.S. worker at the time of the initial consideration. My reply in this regard is to state that we have undergone a recruitment process that included a job position campaign, newspaper advertising, and a state-wide match program. If this testing of the job market does not constitute an "open" job offer, I don't know what criteria would satisfy you regulations. (AF 53-54).

Employer further stated that the requirement of experience in DAC-EASY is essential because it is the system which the company uses for all of its accounting needs, and the company must often access its financial information. Finally, Employer contends that someone with general computer experience could not function with this accounting software program. In support of its contention, Employer enclosed a letter from Alla Miahieva, an accountant who is experienced in the use of DAC-EASY. Ms. Miahieva stated

[I]t took me about four months before I was completely comfortable with DAC-EASY, and able to operate the system autonomously. Conversely, a person without any kind of computerized software background, will experience, in my opinion an even greater degree of difficulty in learning the DAC-EASY system. In addition, of course it goes without saying that someone who has some mainframe and spreadsheet experience means absolutely nothing since it is the program that is significant here, not the computer. (AF 61).

In the FD, the CO states as its basis for denial that Employer did not address the finding that the requirement of DAC-EASY is tailored to the alien's background and therefore, it is deemed admitted. However, Employer did address this issue and found it difficult to respond. This is understandable in that the CO did not challenge this requirement as unduly restrictive which is a prerequisite to finding that it is tailored to the alien's background and to a finding that the position is not clearly open to U.S. workers. *See Canadian National Railway Co.*, 90-INA-66 (Sept. 11, 1992) (*en banc*). Although the CO threw in cites to §§ 656.21(b)(2) and 656.21(b)(6), he did not clearly challenge this requirement as unduly restrictive and did not provide Employer with instructions on how to rebut this finding in its "Corrective Actions Required" section of the NOF. Merely summarizing the regulations and stating the section and subsection is not sufficient notice of the alleged deficiencies, the Certifying Officer must specify what the employer must show to rebut or cure the CO's findings. *Peter Hsieh*, 88-INA-540 (Nov. 30, 1989); *University of Utah*, 87-INA-702 (May 9, 1988). Therefore, the CO's denial based on the supposed failure of Employer to respond to its findings regarding the tailoring of the requirement to the alien cannot stand.

The CO next points to slight differences in Employer's statements in the original recruitment report and the rebuttal regarding the applicant's familiarity with DAC-EASY as inconsistent statements. In fact the two statements were, as quoted by the CO, the applicant "replied that he had no experience whatsoever with the well-known system that we use - DAC-EASY" and the applicant "did not have sufficient DAC-EASY computerized accounting experience." We do not view these two statements to be contradictory. The CO's denial cannot be sustained on this basis.

Finally, the CO discounts the statement of the accountant Alla Miahieva based on the fact that he/she has less experience as an accountant than the applicant. This is not a sufficient basis to find that this statement is "ineffective." It appears from the letter that the accountant had extensive experience in a number of software programs and indicated how long it took her/him to master DAC-EASY. He/she also addressed the fact that someone without experience in accounting software programs versus general mainframe and spreadsheet experience, as

represented by the applicant in his resume as well as in his interview, may take longer to master this software program. Accountant Miahieva's opinion is relevant to the issue of the amount of on-the-job training required based on not only the fact that he/she has worked with this program but also the opinion is coming from someone not connected with the company, an independent source. Therefore, it was incorrect of the CO to reject this opinion out of hand. Her statement and Employer's assertion of the importance of knowledge in the use of this system for performance of the position of Accountant with this company is sufficient evidence to rebut the CO's statement that the applicant would be qualified with a reasonable amount of on-the-job training. Accordingly, the CO's denial based on the rejection of the U.S. worker based on his lack of experience with DAC-EASY is not affirmed on appeal.

Secondly, the CO stated in its NOF that the application only states "auditing background," not experience and for Employer to reject the U.S. worker for never instituting "internal control procedures" in relation to auditing results in rejection of the U.S. worker for undisclosed requirements (AF 75-76). Employer responds that the "essence of auditing is the implementation of internal control procedures" and therefore, it is not "a hidden requirement, but rather an essential part of the auditing process." To support this assertion, a letter is included from Mohammed J. Virani, a licensed C.P.A., who states that auditing requires that

the accountant must go through each corporate department in order to develop internal control procedures. Or, more simply stated, it requires the institution of a check and balance system that will differ from department to department. The mere review of already prepared audit schedules, other than having the word "audit" in it, is something that can be done by a bookkeeper and, in my opinion, does not encompass the responsibilities of an accountant. (AF 59).

The CO, in the FD, merely restates that the rejection for failure to have auditing background was based on a hidden requirement, in that Employer did not clearly state in detail the requirement of experience in implementing internal control procedures. The CO dismisses the opinion of Mr. Virani with the statement "Mr. Virani's statements are not controlling in this matter." However, the CO does not respond with any explanation for its finding that Employer's statement that the "essence of auditing is the implementation of internal control procedures," as bolstered by an independent opinion of an accountant, is incorrect. In fact, the *Dictionary of Occupational Titles*, in its description of the position Accountant at 160.162-018, states "may established, modify, document, and coordinate implementation of accounting and accounting control procedures" as a duty for this position. This phrase is positioned directly after the following phrase "[a]udits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement." *United States Department of Labor, Employment and Training Administration, Dictionary of Occupational Titles* (4<sup>th</sup> ed. rev. 1991). This suggests that the experience required by Employer is a normal job duty for an accountant. The denial may be reversed based on the failure of the CO to adequately address Employer's rebuttal, especially where the evidence submitted on rebuttal is persuasive. *Key Management Group, Inc.*, 94-INA-590 (Feb. 26, 1996). The evidence consisting of Employer's rebuttal letter and the letter from an independent accountant as well as the definition contained in the *Dictionary of Occupational Titles* support a finding that the challenged requirement was not a hidden

requirement but a normal job duty of an accountant and that the applicant did not possess experience in this requirement. Therefore, the applicant was lawfully rejected by Employer on this basis.

As discussed above, Employer has sufficiently supported its rejection of the application Walter Speekman and rebutted the findings of the CO in the NOF. Accordingly, labor certification should be granted in this case.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

For the panel:

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JOHN M. VITTON  
Chief Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition, the Board may order briefs.